UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

WASHINGTON STATE NURSES
ORGANIZING PROJECT (WSNOP)[1]

Respondent

and Case 19-CA-190619

COMMUNICATION WORKERS OF
AMERICA (CWA), LOCAL 7901

Charging Party

/

RESPONDENT'S EXCEPTION TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to §102.46(e) of the Board's Rules and Regulations, the undersigned excepts to the following aspects of the December 23, 2019 Decision of the Administrative Law Judge Eleanor Laws (hereafter ALJD):

1.The ALJD failed to defer to the underlying Arbitrator's Decision in this matter with respect to the remedy, by applying the standards set forth in *Babcock &Wilcox Construction Co., Inc.*, 361 NLRB 1127 (2014), review denied sub. nom. *Beneli v.NLRB*, 873 F.3d 1094 (9th Cir.

[1] Respondent's name has been changed to reflect Counsel for the General Counsel agreement, as set forth in a joint stipulation by the parties, to withdraw the allegation that Respondent WSNOP is a joint or single employer with the American Federation of Teachers (AFT), AFL-CIO. (ALJ Ex. 1, Part III) Further, Counsel for the General Counsel stated on record that it was only proceeding against WSNOP as the Employer and Respondent of record in this matter. (Tr 10)

2017), which was overturned by the Board on December 23, 2019. (ALJD 17)[2] See *United Parcel Service, Inc.*, 369 NLRB No. 1 (Dec. 23, 2019).

Respectfully submitted this 20th day of February, 2020.

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Dated: February 20, 2020

[2] Citations to the ALJD shall be designated as follows: (ALJD __) refers to a specific page of the ALJD.

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BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Counsel for Respondent, Robert D. Fetter of Miller Cohen, PLC, pursuant to §102.46 of the Board's Rules and Regulations, respectfully submits the following Brief in Support of Respondent's Exception to the Administrative Law Judge's Decision (ALJD).

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I. STATEMENT OF THE CASE

Respondent WSNOP employed organizers for the purpose of organizing various facilities in the Vancouver, Washington area, including a very large unit of service workers at PeaceHealth Southwest. This large unit was the primary focus of the WSNOP organizers. WSNOP voluntarily recognized the Charging Party, the CWA, as the Union representing the organizers employed by it, and the parties had a collective bargaining agreement (CBA) in effect at the time all relevant events in this case occurred.

On October 13, 2016, Respondent attempted to hold a staff meeting. At this meeting, organizer Joe Crane engaged in disruptive behavior which caused the meeting to completely go off course and come to an abrupt end. Ultimately, Respondent suspended Crane because of his disruptive behavior. After Crane was suspended, he incited a walkout of the other organizers. In total, seven organizers, including Crane, walked off the job that day. After the workers failed to return to work the following day, they were fired for gross insubordination.[3]

The charge in the instant matter was filed on December 30, 2016. The first amended charge was filed on April 7, 2017. The Region deferred the matter to the grievance procedure, and an arbitration hearing was held in June 2018 before Arbitrator Jim Bailey. Arbitrator Bailey issued his decision on September 21, 2018, finding in favor of the Union and ordering that the discharges be converted to layoffs. In accordance with Article 10 Section 3 of the collective bargaining agreement, he further ordered that employees should receive severance pay equal to two (2) weeks of their base salary as of the date they were discharged.

[3] Although Respondent disagrees with the conclusions of the ALJ that by terminating these employees, Respondent committed an unfair labor practice, Respondent does not except to this aspect of the ALJD.

Thereafter, the Region refused to defer to the Arbitrator's decision based on his ordered remedy, and issued a Complaint against Respondent on February 27, 2019. On December 23, 2019, the ALJD issued, which found that Respondent violated the NLRA, and further deferred to the findings of the Arbitrator, *except* with respect to the Arbitrator's remedy. (ALJD 17) The Arbitrator relied on *Babcock &Wilcox Construction Co., Inc.*, 361 NLRB 1127 (2014), review denied sub. nom. *Beneli v. NLRB*, 873 F.3d 1094 (9th Cir. 2017).

However, the same day that the ALJ issued her decision, the Board issued its decision in *United Parcel Service, Inc.*, 369 NLRB No. 1 (Dec. 23, 2019)[4], in which it overturned *Babcock & Wilcox*, supra, and returned to the previous deferral standard set forth in *Olin Corp*., 268 NLRB 573 (1984), and *Spielberg Mfg. Co*., 112 NLRB 1080 (1955). Under this standard, the Board will defer to arbitrator's decisions unless if (1) the arbitration proceedings were fair and regular, (2) the parties agreed to be bound, (3) the contractual issue was factually parallel to the unfair labor practice issue, (4) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice, and (5) the decision was not clearly repugnant to the purposes and policies of the Act. *Id* at 9. Further, the burden of establishing that a decision is repugnant to the Act is on the party arguing against deferral. *Id* at 10.

Under the deferral standard set forth in *United Parcel Service*, *Olin Corp*, and *Spielberg Mfg. Co*., the Board should defer to the Arbitrator's Decision, including the remedy ordered by the Arbitrator. Counsel for the General Counsel has not met its burden and has not established that the Arbitrator's remedy is repugnant to the Act.

[4] The decision noted it should be applied retroactively "'to all pending cases in whatever stage.'" *United Parcel Service*, supra, at 1.

II. ARGUMENT

In *Babcock & Wilcox*, supra, the Board announced a new test for when post arbitral deferral would be appropriate in 8(a)(1) and (3) cases. Under the *Babcock* test, deferral to an arbitral decision was appropriate where the arbitration procedures appeared to have been fair and regular and the parties agreed to be bound. Moreover, the party urging deferral had the burden of demonstrating that: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law "reasonably permit[ted]" the arbitral award. 361 NLRB No. 132, at 1128, 1131-1132.

The *Babcock* Board issued certain guidelines as to how the above standards should be interpreted and applied. As the Board discussed:

> We shall find that the arbitrator has actually considered the statutory issue when the arbitrator has identified that issue and at least generally explained why he or she finds that the facts presented either do or do not support the unfair labor practice allegation. We stress that an arbitrator will not be required to have engaged in a detailed exegesis of Board law in order to meet this standard.

361 NLRB at 1133.

In the instant matter, the Arbitrator concluded that the discharges of the employees be converted to layoffs, and that, pursuant to the CBA, they should be subject to recall rights if WSNOP were to resume operations. (J 5, p. 22) This was due to the employer ceasing all operations, which the arbitrator noted that by August 2018, all employees of WSNOP were laid off. (J 5, p. 8-9) Further, he ordered that pursuant to the CBA, they should be entitled to two weeks of severance pay. (J 5 p. 22) As noted by the ALJ, the Arbitrator reached his decision, and issued his remedy, after "a 3-day arbitration, which produced a 752-page transcript and multiple exhibits…" (ALJD 17) Further, the ALJ noted that "Arbitrator Bailey made extensive factual findings and engaged in analysis regarding the substantive statutory issues."

However, the ALJ concluded that the remedy ordered by the Arbitrator was not a "reasonable application of the statutory principles that would govern the Board's decision, if the case were presented to it, to the facts of the case." (ALJD 16, citing *Babcock & Wilcox,* supra at 1133.) But, the ALJ specifically noted that she would have found differently under the standards prior to *Babcock and Wilcox,* supra, "[u]nder the previous standard set forth in *Olin Corp*., 268 NLRB 573, 574 (1984), the very limited backpay itself likely would not have rendered the award "repugnant to the Act." (ALJD 16, fn 30)

In *United Parcel Service*, supra, the Board specifically overruled *Babcock & Wilcox*, and returned to the standard previously set forth in *Olin* and *Spielberg*. *United Parcel Service* at 1. The Board noted that:

> Babcock greatly diminished the prospect of Board deferral to collectively bargained grievance arbitration procedures for the resolution of disputes over discharge and discipline. This radical contraction of deferral policy was not persuasively shown to be necessary to protect either employees' Section 7 rights or the Board's jurisdiction to resolve unfair labor practice allegations. Further, by disfavoring the peaceful resolution of employment disputes about discharge and discipline issues through collectively bargained grievance arbitration proceedings, Babcock disrupted the labor relations stability that the Board is charged by Congress to encourage.

Id.

Under the new standard, the Board will once again defer to arbitrator's decisions unless if (1) the arbitration proceedings were fair and regular, (2) the parties agreed to be bound, (3) the contractual issue was factually parallel to the unfair labor practice issue, (4) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice, and (5) the decision was not clearly repugnant to the purposes and policies of the Act. *Id* at 9. Further, the burden of establishing that a decision is repugnant to the Act is on the party arguing against deferral. *Id* at 9-10.

In this case, there appears to be no dispute that the arbitration proceedings were fair and regular, that the parties agreed to be bound, that the contractual issue was factually parallel to the unfair labor practice issue, or that the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In the Arbitrator's introduction he states "[a]t issue were the termination grievances for six bargaining unit members and an Unfair Labor Practice (ULP) charge filed by the Union and deferred by the Board to this arbitration." (J 5, p. 2)[5] Under issues to be decided, he states "[t]he NLRB in its deferral letter listed six issues to be decided in arbitration. The parties to this arbitration jointly agreed that those six issues, (although slightly reworded) shall be determined by this Arbitrator." (J 5, p. 2)

Further, the arbitrator was presented with the facts relevant to resolving the unfair labor practice. He received testimony from all but one of the alleged discriminatees about the same events that were presented in the instant matter. He considered whether there was Union animus by Respondent towards the Union (finding there was not). (J 5, p. 9) He cited Board law in his decision. He specifically considered the evidence of the ULPs, and decided (wrongly, according to Respondent) that the employees rights under Section 7 of the Act were violated. (J 5, p. 15-18)

Thus, this issue turns on the fifth factor under *United Parcel Service*, i.e., whether Counsel for the General Counsel established that the Arbitrator's decision was clearly repugnant to the Act. Counsel for the General Counsel argues that only the remedy is inappropriate. Similarly, the ALJ found it "appropriate to defer to [the Arbitrator's] findings and determinations regarding liability but to reject the remedy." (ALJD 17)

As noted by the ALJ:

> [T]he Board need not "automatically refuse to defer in all situations involving arbitration awards that provide incomplete make-whole remedies, or remedies not

[5] Citations to the Arbitrator's Decision shall be designated as follows: (J 5 __) refers to a specific page of the Arbitrator's Decision.

> otherwise totally consistent with Board precedent." *Cone Mills Corp*., 298 NLRB 661 fn. 19 (1990). Likewise, the Board will defer to an award which is "not a model of clarity." *Smurfit-Stone Container Corp*., 344 NLRB 658, 660 (2005). To be sure, the Board has repeatedly found deferral appropriate despite an arbitrator's denial or curtailment of backpay. See *Specialized Distribution Management*, 318 NLRB 158 (1995); *Crown Zellerbach Corp*., 215 NLRB 385, 387 (1974); *American Commercial Lines*, 291 NLRB 1066 (1988); *Fikse Bros. Inc*., 220 NLRB 1301 (1975).

(ALJD 16)

The ALJ stated that in the decisions cited above where an Arbitrator curtailed the remedy, some justification was offered, such as misconduct, warranting the reduction. (ALJD 16) Despite the ALJ's attempt to distinguish the cases cited above, Board law does not require an arbitrator to cite specific facts to justify a remedy. Further, because the burden is not on Respondent, Respondent should not have to prove which specific facts the Arbitrator relied on in reaching his decision regarding the remedy. Rather, the standard for determining whether an arbitral decision is clearly repugnant is whether it is "susceptible" to an interpretation consistent with the Act. *Olin*, 268 NLRB at 574; see *Motor Convoy*, 303 NLRB 135 (1991). This was the analysis used by the Board in *Cone Mills*, supra (wherein, the Board concluded that the Arbitrator's decision was not susceptible to an interpretation consistent with the Act.) As stated in *Smurfit-Stone Container*, supra:

> "Susceptible to an interpretation consistent with the Act" means precisely what it says. Even if there is one interpretation that would be inconsistent with the Act, the arbitral opinion passes muster if there is another interpretation that would be consistent with the Act. Further, "consistent with the Act" does not mean that the Board would necessarily reach the same result. It means only that the arbitral result is within the broad parameters of the Act. Thus, the Board's mere disagreement with the arbitrator's conclusion would be an insufficient basis for the Board to decline to defer to the arbitrator's award. See *Anderson Sand & Gravel*, 277 NLRB 1204, 1205 (1985). The Board, moreover, will not find an imperfectly drafted arbitral decision clearly repugnant, provided that a reasonable interpretation of the award is consistent with the Act. See *Yellow Freight System*, 337 NLRB 568, 572 (2002) (Board deferred to arbitral award where wording of award was somewhat ambiguous, but could be reasonably interpreted to support a finding consistent

> with the Act); see also *Specialized Distribution Management*, 318 NLRB 158, 163 (1995) (deferral not repugnant to the Act even where arbitrator's "approach and style are at variance from the standards the General Counsel would like to see").

Smurfit Stone Container at 659-660.

Due to public policy and statutory concerns, the Board is reluctant to disturb an arbitrator's award merely to revisit the amount of damages. "We do not believe that it would effectuate the policies of the Act for the Board to enter such a controversy solely for the object of reassessing and, perhaps, adjusting the amount of a monetary award." *Fikse Bros., Inc.*, 220 NLRB 1301 (1975) "The validity of such an award is not, however, to be determined on the basis of whether the Board would reach the same result as reached by the arbitrator." *Container Corp. of Am.,* 210 NLRB 961, 963 (1974).

Here the Arbitrator granted two weeks of back pay for each discriminitee. There is no analysis of what each discriminitee would have been entitled to under the Act. The ALJ noted that the campaign that they were temporarily employed to work on ended in December 2016. (ALJD, pg. 19, FN 36) There is no evidence as to whether the Arbitrator's award was more, less, or the same that they would have been awarded in a back-pay award. However, this is just the sort of analysis that the Board warns against. In *Crown Zellerbach*, supra, the Board cautioned against merely reviewing the amount of a back-pay award:

> The sole ground on which the arbitrator's decision and award is claimed to be repugnant to the purposes and policies of the Act, is that the award which approximates 40 percent gross (not net) backpay does not measure up to the Board's standards for awarding backpay to remedy discriminatory discharges in its unfair labor practice cases. To follow General Counsel's theory would mean that in each case where there was an arbitrator's award which did not provide for full backpay, the General Counsel should pursue the case…Would there be a determination that "X" percentage was acceptable but that "Y" percentage was not? In short, if we follow General Counsel's theory we would come to a mathematical formula which would decide whether an award was repugnant to the Act's purposes and policies.

Id. at 215 NLRB at 387. The Board found that this is not the appropriate to merely review the back-pay award; "[t]he Board has, as in the above-cited case, agreed that it is not repugnant to its purposes and policies to award no backpay. The Board certainly would not place itself in the position of stating that partial backpay is repugnant to the purposes and policies of the Act when the sole issue is the amount of backpay. If the proceedings were not fair and regular or if the award on its face contained grievous error, the Board might wish to scrutinize the matter, but that is not the situation here." *Id*.

Therefore, the party seeking to revisit the amount of a back-pay award has a very high burden. That burden is not met here.

The Arbitrator's award in the instant matter is susceptible to an interpretation consistent with the Act. It can be interpreted that the Arbitrator felt that under all of the circumstances as analyzed and described by him in great detail, while discharge may have been too extreme of a punishment, perhaps a full backpay remedy was not justified either. Although Respondent does not have the burden of proving the Arbitrator's intent, it can be inferred in this case from other language in his analysis. For example, he comments that "[e]ven if one were to find insubordination at the meeting it would not rise to an egregious level to support discharge." (J 5, p.18) He also interpreted provisions of the collective bargaining agreement when deciding the remedy. (J 5, p. 22.) An arbitrator's decision "must be read in its entirety to fairly determine its meaning." *Doerfer Engineering*, 315 NLRB 1137, 1139 (1994), enf. denied on other grounds 79 F.3d 101 (8th Cir. 1996).

Moreover, the Arbitrator considered the status of the Employer's operations at the time of the arbitration award. The arbitrator noted that WSNOP had "ceased to exist" in the time after the hearing but prior to the issuance of his award. (J 5 p. 8-9, 19) The AFT was not a party to the

collective bargaining agreement between WSNOP and the CWA. Based on his award, he considered only his authority as to WSNOP, which he awarded severance and recall rights pursuant to the CBA. CWA did not seek any additional argument or additional evidence on how the ceasing of operations of the employer would affect the arbitration award.

Moreover, even if the ALJ were to undertake the back-pay analysis proscribed in *Crown Zellerbach*, supra, and its progeny, the record did not contain the information to do so. In *In re Laborers Intern. Union of North America*, the NLRB rejected a challenge to the arbitrator's award because the record did not contain sufficient information to determine the extent of the damages to the discriminitees. *Id*. 331 NLRB 259, 262 (2000). Again, at some point between the time period beginning with the disputed terminations, through the certification election shortly thereafter, which was the focus of their work, and ending with the complete cessation of operations, all of the alleged discriminitees would have been laid off. The severance payments would not be mitigated. A back-pay award would be mitigated. There was no evidence submitted regarding when the discriminitees would have been laid off based on the seniority provisions of the CBA or their mitigation. Therefore, there is no factual record as to whether arbitration award provided a larger award, same award or smaller award for any particular discriminitee.

Although this Arbitrator may not have issued the same remedy that the Board would have reached, the Arbitrator's decision is not repugnant to the Act. To find otherwise would discourage the national policy of encouraging arbitration of disputes over the application or interpretation of collective-bargaining agreements. The Arbitrator clearly ordered the remedy after considering all of the alleged ULPs and all of the evidence before him.

IV. CONCLUSION

For the reasons set forth above, Respondent respectfully urges the Board to grant the above exception and accordingly, refuse to adopt the Administrative Law Judge's decision.

Dated at Detroit, Michigan, this 20th day of February, 2020.

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